*PDS 315323

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v

WILLIAM LYLES, JR. **No.**
Defendant-Appellee.

L.C. No. 12-008021-FC Wayne Cnt
COA No. 315323

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APP
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APPLICATION FOR LEAVE TO APPEAL

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Statement of the Question

I.

Did defendant fail to show that the failure of the trial judge to instruct as requested under M Crim JI 5.8a was more probably than not outcome determinative; further, should Court review M Crim JI 5.8a(1), and hold that it is not error to fail to give it, as it should not be given at all?

The People answer: "YES"

Statement of Facts

The Court of Appeals opinion succinctly lays out the relevant facts:

Defendant's conviction arose from the stabbing death of the victim in December of 1983. At the time of his death, the victim lived with a relative, Louise Kountz and her daughters. Defendant had been in a long term dating relationship with Kountz, which was, according to numerous witnesses, violent and abusive. Before the victim's death, defendant had moved out of the home, and defendant had communicated to one of Kountz's daughters that he blamed the victim for "all their problems." He had also been overheard to say that he was "going to get" the victim. Thereafter, the victim was stabbed in the house one night when others in the home were asleep.

The perpetrator broke a window in the basement to gain entry, placed the family dog in the freezer, presumably to prevent the dog from sounding an alarm, and cut the electricity to the home. Although no one saw defendant enter the home that evening, something awakened the family and the victim's death was discovered. Kountz's daughters saw a shadowy figure consistent with defendant's size and shape exit the home, and one daughter in particular smelled a distinctive stale cigarette odor she associated with defendant. The girls ran to a neighbor's home and told their neighbor that defendant had killed the victim. Defendant's shoes, with sponge taped on the bottom, were recovered in the home. In 1984, police obtained a warrant for defendant's arrest, but defendant was not apprehended. He ceased contact with Kountz's family and, sometime after the victim's death, defendant left the state of Michigan. Police located defendant in 2012 and, after his identification by one of Kountz's daughters, he was charged with murder. Following a jury trial, defendant was convicted of first-degree murder.

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Relevant to defendant's claim, at trial, the trial court read an initial set of instructions to the jury. Afterward, out of the presence of the jury, defense counsel informed the trial court that "some instructions were not read." Among other omitted instructions, defense counsel indicated that M Crim JI 5.8a had not been included in the court's instructions. Thereafter, the trial court provided the jury with several additional instructions. Apparently in an attempt to respond to defendant's request for M Crim JI 5.8a, the trial court instructed the jury as follows:

> [Y]ou've heard the testimony of—about witness' truthfulness. You may consider this evidence together with all other evidence in the case in deciding whether you believe the testimony of the witness, inn [sic] deciding how much weight to give to that witness. The prosecutor has examined some of defendant's character witnesses as

to whether or not they heard anything bad about the defendant. You should consider such cross-examination only in deciding whether or not you believe the character witness and whether they described the [defendant] fairly.

The prosecutor also has called witnesses who have testified that the defendant did not have good character of the other acts.[FN5]

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When the trial court finished providing this and other additional instructions, defense counsel again objected, stating that there were "a couple of instructions that were not read exactly as how they appear in the Criminal Jury Instructions." Regarding M Crim JI 5.8a(1), defense counsel noted that the instruction as given did not conform to the evidence defense provided during trial which related to non-violence and domestic relationships, not truthfulness. Although defense counsel indicated that she wanted to place her objections on the record, she did not ask the trial court to provide additional clarification to the jury.

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Relevant to defendant's claims, M Crim JI 5.8a(1) provides:

> (1) You have heard evidence about the defendant's character for [peacefulness/honesty/good sexual morals/being law-abiding/(describe other trait)]. You may consider this evidence, together with all the other evidence in the case, in deciding whether the defendant committed the crime with which (he/she) is charged. Evidence of good character alone may sometimes create a reasonable doubt in your minds and lead you to find the defendant not guilty.

In this case, defendant is correct that the trial court did not read this instruction to the jury or otherwise inform the jury about the proper use of character evidence presented by defendant. . . . . Specifically, the instruction failed to mention either defendant or his character evidence relating to his peacefulness, and it failed to advise the jury that evidence of good character alone may be sufficient to create a reasonable doubt. . . . we are also persuaded that defendant was entitled to the sought after instruction on his character evidence. Defendant introduced testimony at trial from a family friend who had grown up on defendant's street and known him all her life. She testified that: (1) in her opinion defendant was a peaceful person, and (2) that he had a reputation in the community, including at the time of the murder, as a peaceful person. Clearly, her testimony constituted evidence on defendant's character for peacefulness.

People v. Lyles, 2014 WL 3612745, 1-4(Mich.App.,2014).

The People would add that in closing argument defense counsel never mentioned the character proof. See T, 1-18, 129-146. The defense argument was that the prosecution case "amounted to nothing" and "added up to zero" because the proofs were inadequate and the witnesses not credible, and that in fact defendant had "zero motive." This was also the theme of counsel's opening statement, where nothing was spoken regarding the character of the defendant or character proof. T, 1-15, 42-50.

The Court of Appeals reversed, and on August 22, 2014 denied the People's motion for rehearing. The People seek leave.

Argument

I.

Defendant did not show that the failure of the trial judge to instruct as requested under M Crim JI 5.8a was more probably than not outcome determinative; further, this Court should review M Crim JI 5.8a(1), and hold that it is not error to fail to give it, as it should not be given.

A. Introduction

In its opinion, the Court of Appeals found, appropriately, that the trial court bolixed up the giving of the instruction on character, M Crim JI 5.8a: "Specifically, the instruction failed to mention either defendant or his character evidence relating to his peacefulness, and it failed to advise the jury that evidence of good character alone may be sufficient to create a reasonable doubt. Rather than instruct the jury that defendant's good character could be considered in relation to whether defendant committed the crime, the instruction references the truthfulness of some unnamed witness." Slip opinion, at 4.

The court went on to find that the mistake was reversible, holding that "Where a jury is not adequately instructed on the use of good character evidence, a trial court may be said to *deny a defendant the full benefit his character evidence might otherwise afford him*. See *People v Jassino*, 100 Mich 536, 537; 59 NW 230 (1894)."[1] The court thus held that because the trial court 1) "failed to mention either defendant or his character evidence relating to his peacefulness," and 2) "failed to advise the jury that evidence of good character alone may be sufficient to create a reasonable doubt," a miscarriage of justice resulted (though the court never said that the defendant had carried his burden of showing that it was more likely than not that this error was outcome determinative).

[1] Slip opinion, at 5 (emphasis supplied).

But the People submit that in fact it cannot be shown that the "error" was more probably than not outcome determinative; further, this Court should find that the failure to instruct on M Crim JI 5.8a(1) is *not error at all*, as the instruction should not be given.

B. Defendant Has Not Carried *His* Burden of Showing That it Is More Probable than Not That the "Error" Was Outcome Determinative

This Court has observed that "Both the value and the wisdom of presenting character evidence have been doubted. It is thought that such evidence typically adds little of relevance to the determination of the actual issues in a case and is likely to inject extraneous elements."[2] And here character proof—which this Court has said "typically adds little of relevance"—was hardly important to defendant's theory of defense, as demonstrated quite clearly by his closing argument. And defendant was *not* deprived of the benefit of his proofs on the point, as he was absolutely free to argue to the jury that he had presented witnesses on the defendant's character for peacefulness, and argue the weight the jurors should give that evidence. So, what did counsel say regarding the character proof presented? *Not one word.* See T, 1-18, 129-146. The defense argument was that the prosecution case "amounted to nothing" and "added up to zero" because the proofs were inadequate and the witnesses not credible, and that in fact defendant had "zero motive." This was also the theme of counsel's opening statement, where nary a word was spoken regarding the character of the defendant or character proof. T, 1-15, 42-50.

In this context, then, where the character proofs presented were not even argued by defense counsel, no miscarriage of justice appears. As this Court has put the defendant's burden in this regard,

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[2] *People v. Whitfield*, 425 Mich. 116, 129-130 (1986).

> The object of this inquiry is to determine if it affirmatively appears that the error asserted "undermine[s] the reliability of the verdict." *Id.* at 211, 551 N.W.2d 891. In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether *it is more probable than not that a different outcome would have resulted without the error*. Therefore, the bottom line is that § 26 presumes that a preserved, nonconstitutional error is not a ground for reversal unless "after an examination of the entire cause, it shall affirmatively appear" that it is more probable than not that the error was outcome determinative.[3]

For this reason, the Court of Appeals should be reversed.

C. It Was Not Error to Fail to Give M Crim JI 5.8a(1), as this Court Should Hold That the Instruction Should Not Be Given

M Crim JI 5.8a(1) provides:

> You have heard evidence about the defendant's character for [peacefulness / honesty / good sexual morals / being law-abiding / (describe other trait)]. You may consider this evidence, together with all the other evidence in the case, in deciding whether the defendant committed the crime with which (he / she) is charged. Evidence of *good character alone may sometimes create a reasonable doubt in your minds and lead you to find the defendant not guilty* (emphasis supplied).

By way of comparison, a sampling of federal circuit pattern criminal jury instructions show:

- **7.09 CHARACTER AND REPUTATION OF DEFENDANT/Sixth Circuit**

  > You have heard testimony about the defendant's good character. You should consider this testimony, along with all the other evidence, in deciding if the government has proved beyond a reasonable doubt that he committed the crime charged.[4]

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[3] *People v. Lukity*, 460 Mich. 484, 495-496 (1999).

[4] **"Committee Commentary 7.09.** Some instruction on the defendant's good character is required if supported by the evidence. . . . But there is disagreement about whether the instruction must say that good character evidence 'standing alone' may create a reasonable doubt of guilt. . . . the Committee has omitted the 'standing alone' language."

- **3.06 CHARACTER AND REPUTATION OF DEFENDANT/7th Circuit.**

  You have heard [reputation and/or opinion] evidence about the defendant's character trait for [truthfulness, peacefulness, etc].

  You should consider character evidence together with and in the same way as all the other evidence in the case.[5]

- **4.03 DEFENDANT'S CHARACTER "STANDING ALONE"/8th Circuit**

  [No instruction recommended.][6]

- **4.4 CHARACTER OF DEFENDANT/9th Circuit**

  [No instruction][7]

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[5] **"Committee Comment**. Until 1985, this Circuit adhered to the idea that a 'standing alone' instruction was necessary. . . . However, in *United States v. Burke*, 781 F.2d 1234, 1238-42 (7th Cir. 1985), this Circuit joined the rest of the circuits (except perhaps the Tenth Circuit; . . . and rejected the 'standing alone' instruction:

> The "standing alone" instruction conveys to the jury the sense that even if it thinks the prosecution's case compelling, even if it thinks the defendant a liar, if it also concludes that he has a good reputation this may be the "reasonable doubt" of which other instructions speak. *A "standing alone" instruction invites attention to a single bit of evidence and suggests to jurors that they analyze this evidence all by itself. No instruction flags any other evidence for this analysis -- not eyewitness evidence, not physical evidence, not even confessions. There is no good reason to consider any evidence "standing alone."*

Burke, 781 F.2d at 1239 (emphasis supplied).

[6] **"Committee Comments**. . . . The Eighth Circuit, along with some other circuits, has disapproved the giving of a 'standing alone' instruction (that proof of the defendant's good character, standing alone, may be sufficient to create a reasonable doubt with respect to such evidence) with regard to such evidence."

[7] "**Comment**. The Committee believes that the trial judge need not give an instruction on the character of the defendant . . . . because it adds nothing to the general instructions regarding the consideration and weighing of evidence."

No error occurred in the failure to give M Crim JI 5.8(1), as this Court should hold the instruction should not be given. Counsel can present his evidence, the prosecution can present rebuttal evidence to it or not, and the parties can argue its weight and meaning to the jury, including an argument by the defense that if the evidence is believed it may itself raise a reasonable doubt. Why should the judge intervene with an instruction on the matter? If the prosecution presents an eyewitness who positively identifies the defendant as the perpetrator of a shooting, is it appropriate for the judge to instruct the jury that if this witness is believed, his or her testimony standing alone may be sufficient for a finding of guilty beyond a reasonable doubt? The People think not; such instructions put an inappropriate judicial thumb on the scale. As the 7th Circuit Instruction Committee Comment observes, "*A 'standing alone' instruction invites attention to a single bit of evidence and suggests to jurors that they analyze this evidence all by itself. No instruction flags any other evidence for this analysis -- not eyewitness evidence, not physical evidence, not even confessions. There is no good reason to consider any evidence 'standing alone.'*"[8]

The jury here was instructed that "a reasonable doubt is a fair, honest doubt growing out of the evidence or the lack of evidence," T, 1-18, 155, and that the jurors "should consider all the evidence that you believe." T, 1-18, 161. They were also instructed that "As jurors you must decide what the facts are. That's your job and that's nobody else's job. *You must think about all of the evidence and decide each piece of evidence, what it means and how important you think it is.* That

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[8] Cf. *People v. Young*, 472 Mich. 130 (2005). And see *United States v. Akinsanya*, 53 F.3d 852, 857 (CA 7, 1995): "The pattern jury instruction which the district court gave was an accurate statement of the law regarding the weight to be accorded character evidence. There was no need to duplicate the charge to the jury *or emphasize the importance of one type of evidence over another*. . . . (instructions which are accurate statements of the law and which are supported by the record will not be disturbed on appeal). The law is clear in this Circuit, the 'standing alone' instruction 'even if allowable' is 'never necessary'" (emphasis supplied).

includes whether you believe what each of the witnesses said, what you decide about any fact in the case is final." T, 1-18, 154. These instructions were adequate; certainly, if no "standing alone" instruction is required on request, it cannot be said that the instructions given more probably than not were outcome determinative in the case, even if somehow erroneous.

Because, given the defendant's theory of defense, the lack of instruction here cannot be said to more probably than not have been outcome determinative, and because M Crim JI 5.8a(1) should not be required, leave should be granted, and the Court of Appeals reversed.

Relief

Wherefore, the People respectfully request that leave be granted, and defendant's conviction reinstated.

Respectfully submitted,

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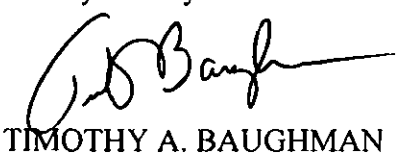

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